90-1672

No. _____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WARREN J. HOFFMAN,

Petitioner,

v.

ROBERT W. KIMPTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
District Court's Findings of Fact and Conclusions of Law dated May 2, 1990	1
District Court's Decree of Adoption dated May 3, 1990 . . .	10
Opinion of the Supreme Court of the State of Montana dated December 13, 1990	13
Appellant's Petition for Rehearing dated December 22, 1990	25
Order of the Supreme Court of the State of Montana dated January 28, 1991	56
Supreme Court Docket Sheet . . .	58

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

IN THE MATTER OF THE ADOPTION OF	)
	)
CHELSEA JO HOFFMAN, WHITNEY LIN HOFFMAN, and TORY ANN HOFFMAN,	)
	)
Minors.	)

No. DA 89-001
Judge William J. Speare

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The Petition of Robert W. Kimpton for the adoption of the above-captioned minor children came before this Court for hearing. The Petitioner appeared with his attorney, Marvin R. Ventrell. The Respondent Warren J. Hoffman natural father of the minor children appeared with his attorney, Donald L. Harris. Mary C. Anderson natural mother of the minor children appeared. Chelsea Jo Hoffman, Whitney Lin Hoffman and Tory Ann Hoffman each of the minor children also appeared.

Testimony and evidence were presented to the Court, and the Court now makes the

following:

FINDINGS OF FACT

1. The Court possesses subject matter and personal jurisdiction of this cause.

2. Petitioner Robert W. Kimpton is a citizen of the United States of America, is a resident of Billings, Yellowstone County, Montana is thirty-four (34) years of age, and is in all respects a proper person to adopt the minor children.

3. Petitioner married the minor children's natural mother, Mary C. Anderson on the 24th day of September, 1986, and they have ever since been residing together as husband and wife.

4. The minor children of this adoption are Chelsea Jo Hoffman, Whitney Lin Hoffman and Tory Ann Hoffman, whose respective dates of birth are, June 16, 1976; May 18, 1978; and November 23, 1979.

5. The minor children's natural mother Mary C. Anderson divorced Respon-

dent, Warren J. Hoffman, the children's natural father and the Decree of Dissolution was entered on the 28th day of May, 1986.

6. The Decree of Divorce provides that Mary C. Anderson shall be the minor children's residential custodian and that Respondent Warren J. Hoffman pay monthly child support in the sum of One Hundred Twenty-Five and No/100ths Dollars ($125.00) per child, and further provided that Respondent maintain medical insurance coverage for the children.

7. The Respondent, Warren J. Hoffman, has never given his consent to this adoption and opposes said adoption.

8. In December of 1987 Respondent provided child support to the Petitioner in the amount of $200.00. At that time Respondent was required to pay the sum of $375.00 per month by way of child support. In addition Respondent was to maintain medical insurance upon the children.

Respondent has maintained no medical insurance upon the children at least since December of 1987. In the calendar year of 1988 Respondent paid to the Petitioner no child support. Respondent contends that in September of 1988 he obtained a money order in the amount of $100.00 which was acquired by the Petitioner but was returned by the Petitioner to the Respondent upon that day. The Petitioner and Respondent had heated arguments over this payment, Respondent claiming it was the best he could do and Petitioner claiming that it was grossly inadequate. This incident apparently occurred on a Sunday and during the next week the Petitioner changed her mind and endeavored to reobtain the said $100.00 but by the following Friday it was clear that Respondent no longer intended to furnish the $100.00 and Petitioner never received the $100.00 in the year 1988. The Respondent has testified, and it is not refuted that he

did provide clothing for the children in that year of 1988 in approximately the amount of $200.00. This Petition for Adoption was filed January 3, 1989. The Respondent has furnished payments to Petitioner since the beginning of the year 1989 as follows: $40.00 in February, $40.00 in March, $100.00 in May and an additional $100.00 in May all of 1989. The evidence at the hearing, although disputed, shows that Respondent had a gross income during the year of 1988 of at least $10,000.00.

9. The consent of Respondent Warren J. Hoffman to this adoption is not required pursuant to MCA §40-8-111(1)(a)(v)(1987) because he has failed in his child support obligation.

10. Each of the children desire this adoption and have given their consent thereto. Chelsea Jo Hoffman, being the only child twelve (12) years of age or older has filed her formal consent with

the Court pursuant to MCA §40-8-113 (1987).

11. Mary C. Anderson the natural mother, desires and consents to the adoption and has filed her formal consent thereto and affidavit in support thereof.

12. There is not a good relationship between Respondent, Warren J. Hoffman and the minor children, and continued contact between Respondent and the children seriously endangers the children's physical and emotional welfare.

13. There is a good relationship between the Petitioner, Robert W. Kimpton, and the children and Petitioner presently supports the children emotionally and financially and wishes to and is capable of continuing to do so.

14. For all practical purposes, Petitioner has acted as the minor children's natural father.

15. It would be in the best interests of the minor children if they were

adopted by Petitioner.

16. The Montana Department of Family Services has filed a Waiver of Investigation pursuant to MCA §40-8-122 (1987).

17. It would be in the best interest of the children if this Court waived entry of an interlocutory decree and waiting period, entered a summary decree of adoption pursuant to §40-8-123 (1987) at this time.

18. Respondent contends that §40-8-111(1)(a)(v) is unconstitutional in that it violates Respondent's rights of liberty, equal protection, and due process under both the United States and the State of Montana's Constitution.

From the above Findings of Fact the Court now makes the following:

C O N C L U S I O N S O F L A W

1. The Findings of Facts are incorporated herein and made the Conclusions of Law of this Court.

2. The Respondent, Warren J.

Hoffman, has never given his consent to this adoption and opposes said adoption.

3. That §40-8-111(1)(a)(v) is not unconstitutional under either the Federal or State Constitutions in that the Respondent's fundamental liberty interest has not been violated and that this action is not taken by the State of Montana acting under the section but even so the State of Montana has a compelling State interest in the adoption of children and hence the disputed section is neither unconstitutional in general nor as applied to this particular case.

4. The parental rights of Respondent Warren J. Hoffman, may be terminated and his consent is not required for this adoption.

5. It would be in the best interest of the minor children if adopted by Petitioner and a summary decree of adoption entered at this time.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED AND SIGNED this 2 day of May, 1990.

s/William J. Speare
WILLIAM J. SPEARE, District Judge

cc: Marvin Ventrell
Donald L. Harris

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail & hand upon the parties or their attorneys of record at their last known address this 2 day of May, 1990.

Honorable William J. Speare

By s/Connie Kellison

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

IN THE MATTER OF THE ADOPTION OF)
)
CHELSEA JO HOFFMAN, WHITNEY LIN)
HOFFMAN, and TORY ANN HOFFMAN,)
)
Minors.)

No. DA 89-001
Judge William J. Speare

DECREE OF ADOPTION

This action came before this Court for trial on the 18th day of May, 1989. The issues were tried, a decision was rendered, and it is hereby

ORDERED, ADJUDGED AND DECREED

1. That the Court's Findings of Fact and Conclusions of Law dated May 2, 1990, are hereby incorporated into and made a part of this Order, Judgment and Decree;

2. That the Petitioner of ROBERT W. KIMPTON for the adoption of the minor children, CHELSEA JO HOFFMAN, WHITNEY LIN HOFFMAN and TORY ANN HOFFMAN is granted;

3. That the parental rights of the Respondent, WARREN J. HOFFMAN, as to the

minor children, CHELSEA JO HOFFMAN, WHITNEY LIN HOFFMAN and TORY ANN HOFFMAN are terminated;

4. That CHELSEA JO HOFFMAN, WHITNEY LIN HOFFMAN and TORY ANN HOFFMAN are hereby declared adopted by ROBERT W. KIMPTON, Petitioner, hereinafter to be known as CHELSEA JO KIMPTON, WHITNEY LIN KIMPTON and TORY ANN KIMPTON; and

5. That Petitioner, ROBERT W. KIMPTON, together with his wife, MARY C. ANDERSON, the Natural Mother of the children have the status of parents of the children to be treated in all respects as Petitioner's lawful children, and that all other persons are released of any parental duty toward the children and have no right of control whatsoever over them, except the minor children's Natural Mother, and that the Petitioner and children shall sustain toward each other the legal relationship of parent and child and have all the rights and privileges, and be subject

to all the duties of that relationship.

DATED this 3rd day of May, 1990.

s/WILLIAM J. SPEARE
DISTRICT JUDGE

No. 90-267

IN THE SUPREME COURT OF THE STATE OF MONTANA

1990

IN THE MATTER OF THE ADOPTION OF C.J.H., W.L.H., T.A.H., Minors

APPEAL FROM: District Court of the Thirteenth Judicial District, in the for the County of Yellowstone, The Honorable William J. Speare, Judge Presiding.

COUNSEL OF RECORD:

For Appellant:

Donald L. Harris; Crowley, Haughey, Hanson, Toole & Dietrich, Billings, Montana

For Respondent:

Marvin R. Ventrell; Gannett & Ventrell; Billings, Montana (R.W.K., Petitioner)

Submitted on Briefs: October 19, 1990

Decided: December 13, 1990.

s/ Ed Smith
Clerk

Justice Fred J. Weber delivered the Opinion of the Court.

This appeal involves an adoption proceeding held in the Thirteenth Judicial

District, Yellowstone County. Robert Kimpton, the stepfather of three minor children, filed a petition for their adoption. The childrens' natural father, Warren Hoffman, did not consent. Following trial the Court entered its decree of adoption terminating the natural father's parental rights. He appeals. We affirm.

The issues before us are:

1. Did the District Court act within its discretion when it granted the Petition for Adoption and terminated the natural father's rights?

2. Is § 40-8-111(1)(a)(v), MCA, constitutional under the United States Constitution and the Constitution of the State of Montana?

Warren Hoffman (Warren) and Chris Anderson (Chris) were married February 15, 1975. Three children were born of the marriage.

Warren and Chris were divorced in 1986 and were awarded joint custody by

decree. Warren was ordered to pay a total of $375 per month in child support and carry medical insurance for the children.

Later that year, Chris married Robert Kimpton (Robert), and the couple have resided together with the three children since that time. In 1989, Robert filed a Petition for Adoption of the children, alleging that Warren's consent was not required because he failed to support the children during the one year preceding the filing of the Petition, and that the adoption would be in the best interests of the children. Chris consented to the adoption; the Department of Family Services approved the adoption; and Warren objected to the adoption.

Prior to granting the adoption and terminating Warren's parental rights, the District Court made the following pertinent findings of fact: In December, 1987, Warren paid $200 in child support rather than the required $375 per month. He had

failed to maintain medical insurance for the children at least since December of 1987. In 1988, Warren paid no child support. He maintained that he obtained a $100 money order and gave it to Chris, but that she gave it back. Warren claimed that the $100 was the best he could do and Chris maintained it was not enough. The Petition for Adoption was filed January 3, 1989. Warren furnished payments to Chris since the beginning of the year 1989 as follows: $40 in February, $40 in March, $100 in May and an addition $100 in May of 1989. Warren had a gross income during 1988 of at least $10,000.

The District Court also found that there is not a good relationship between Warren and the three children and continued contact between Warren and the children seriously endangered the childrens' physical and emotional welfare. It found that a good relationship did exist between Robert and the children and that it would

be in the best interests of the children if they were adopted by Robert.

The court concluded that the parental rights of Warren may be terminated without his consent. It further determined that it is in the best interests of the children that they be adopted by their stepfather, Robert. From that decision, Warren appeals.

I

Did the District Court act within its discretion when it granted the Petition for Adoption and terminated the natural father's rights?

Warren contends that his consent was required since he paid as much child support as he was financially able. He maintains that his offer of the $100 money order and a coat he purchased for one of the children was sufficient to require that he must still give his consent to the adoption.

Robert and Chris maintain that Warren

failed to provide support for his children during the one year period preceding the filing of the adoption petition. They contend that Warren refused to hand over the $100 money order after Chris made it clear to him that it in no way satisfied his child support obligation. They further maintain that payments in kind, (ie. the coat), do not apply as child support. Rather, they maintain that child support means financial support.

Section 40-8-111, MCA, defines the consent required for adoption.

> (1) An adoption of a child may be decreed when there have been filed written consents to adoption executed by:
>
> (a) both parents, if living, or the surviving parent of a child, provided that consent is not required from a father or mother:
>
> . . .
>
> (v) if it is proven to the satisfaction of the court that the father or mother, if able, has not contributed to the support of the child during a period of 1 year before the filing of a petition for adoption; . . .

Thus, a father's rights may be terminated, and an adoption decreed without his consent upon a showing of nonsupport under the above statute. It is the public policy in Montana that the statutes concerning the termination of parental rights should not be interpreted in favor of those who shun the burden of parental obligations, In the Matter of the Adoption of D.J.V. (Mont. 1990), 796 P.2d 1076, 1078, 47 St.Rep. 1522, 1524. The District Court found Warren failed in his child support obligation, and therefore his consent was not needed under § 40-8-111(1)(a)(v), MCA.

In determining whether child support was paid during the one year period immediately preceding the filing of the petition for adoption, this Court has stated that any payment of support must first be applied to satisfy the earliest arrearage before it is applied to the support owed during the year before the fil-

ing of the Petition for Adoption. Warren maintains that the payments totalling $180 made in 1989 exceeded arrearages accrued prior to the filing of the petition for adoption. Chris and Robert maintain that payments made after the filing may not be applied to the pre-adoption year. We agree. Otherwise, any parent delinquent with child support payments could wait until after the filing of the petition for adoption to prevent the adoption, even when contrary to the best interests of the children. The payments made in 1989 by Warren were de minimus at best, considering the child support ordered was $375 per month and no medical insurance was provided. We hold that the District Court acted within its discretion when it granted the Petition for Adoption and terminated the natural father's rights.

II

Is § 40-8-111(1)(a)(v), MCA, constitutional under the United States Constitu-

tion and the Constitution of the State of Montana?

Warren maintains that § 40-8-111(1)(a)(v), MCA, is unconstitutional because a liberty interest has been taken away without the existence of a compelling state interest. However, we note that Warren has not complied with Rule 38, M.R.App.P., which states:

> It shall be the duty of counsel who challenges the constitutionality of any act of the Montana legislature in any suit or proceeding in the supreme court to which the state of Montana, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to the court of the existence of said question, specifying the section of the code or the chapter of the session law to be construed. The clerk shall thereupon certify such fact to the attorney general of the state of Montana (Emphasis added).

Warren filed notice of appeal on May 7, 1990. The record was filed on May 25, 1990. Warren did not file his notice of constitutional challenge until June 13,

1990, twenty days later. A delay of twenty days does not constitute "immediate" notice as prescribed by Rule 38, M.R.App.P. Warren offers no explanation for his delay in filing notice of constitutional challenge.

What exactly "immediate" means under Rule 38 has not been defined. However, this Court has held that a delay of 3 days was sufficiently "immediate" to file an affidavit of disqualification of a judge when the reason for the delay was reasonable. (Plaintiff resided in Lake County but had to travel to Missoula County to sign an affidavit of disqualification and the Thanksgiving holiday was the day after he received notice.) See Wheeler v. Moe (1973), 163 Mont. 154, 515 P.2d 679.

"Immediate" is defined in Black's Law Dictionary, 6th ed. (1990) as follows:

> Present; at once; without delay; not deferred by any interval of time. . . . A reasonable time in view of particular facts and circumstances of case under consideration. . . .

We conclude that Warren has presented no facts to explain the delay of twenty days in filing his notice of constitutional challenge. We therefore conclude that he has failed to comply with the requirements of Rule 38, M.R.App.P. We will not address the question of the constitutional challenge.

Affirmed.

s/Fred J.Weber

We concur:

s/J. A. Turnage
Chief Justice

s/John C. Sheehy

s/Diane G. Barz

s/John Conway Harrison
Justices

Justice R. C. McDonough dissenting.

A parent has a "fundamental liberty interest" in continuing his parental relationship with his children. See Santosky v. Kramer (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-5, 71 L.Ed.2d 599, 606. A decree terminating the

parental relationship must be supported by clear and convincing evidence. See Matter of Adoption of R.M., S.P.M. and R.M. (1990), 241 Mont. 111, 118, 785 P.2d 709, 713.

Strict compliance with the statute is required. Matter of adoption of B.L.P. (1986), 224 Mont. 182, 184, 728 P.2d 803, 804. The petitioner by statute must prove by clear and convincing evidence the failure to support for the one year while being able to do so. Here the record fails to show by clear and convincing evidence the ability of the appellant to pay the support; and the district Court did not make any finding as to the appellant's ability to pay.

I would reverse and dismiss the petition.

s/R. C. McDonough

Justice Wm. E. Hunt, Sr. joins in the foregoing dissent.

s/William E. Hunt, Sr.

IN THE SUPREME COURT

OF THE STATE OF MONTANA

Case No. 90-267

IN THE MATTER OF THE ADOPTION)
OF C.J.H., W.L.H., T.A.H., Minors.)

APPELLANT'S PETITION FOR REHEARING

COMES NOW the appellant and, pursuant to Rule 34, Montana Rules of Appellate Procedure, respectfully petitions the Montana Supreme Court for a rehearing of this appeal. As shown below, this Court's December 13, 1990 decision is in direct conflict with controlling precedent and overlooks facts critical to the decision.

I. Appellant Counsel's Delay in Filing the Rule 38 Notice Was Inadvertent and Uncontested by Respondent's Counsel.

In the second part of its decision, this Court declined to review appellant's constitutional challenges to M.C.A. §40-8-111(1)(a)(v) because, under Rule 38, appellant's counsel failed to give immedi-

ate notice of his constitutional challenge. This Court further noted that appellant's counsel offered no explanation for his failure to provide immediate notice.

As set forth in the attached Affidavit of Donald L. Harris (Exhibit A), appellant's counsel did not explain why he failed to give immediate notice under Rule 38 because this issue was never raised on appeal. Respondent's counsel did not contend in his brief that this Court could not consider the constitutional questions because of late notice to the Attorney General. Nor was there any indication that the Attorney General intended to participate in this case. As the attached Affidavit of Patricia Jordan (Exhibit B), the staff attorney with the Attorney General's office who reviews constitutional challenges, demonstrates, the Attorney General elected not to intervene in this case. Had appellant's counsel

received any indication that a late Rule 38 notice had caused prejudice, a full explanation would have been provided.

The explanation set forth in the Harris Affidavit shows that the late notice was totally inadvertent, resulting from Mr. Harris' misunderstanding of Rule 38. Though this Court stated that notice was 20 days late, the delay between when Mr. Harris received notice of filing of the record, May 29, and when he mailed the Rule 38 notice, June 11, was 12 days, 4 of which were weekend days. This delay certainly did not hinder the Attorney General's office from participating given that the Attorney General's office normally does not make the decision to intervene until it receives the appellant's initial brief. See Jordan Affidavit. Appellant's counsel served the Attorney General's office with copies of all appellant's briefs at the same time they were filed. Thus, appellant's short delay in

filing the Rule 38 notice was caused solely by counsel's inadvertence and caused no prejudice.

II. Given the Circumstances, This Court's Refusal to Consider the Constitutional Issues Conflicts With Its Prior Decisions.

This Court's decision not to review Mr. Hoffman's constitutional challenges conflicts with controlling precedent interpreting Rule 38. In U.S. Manufacturing and Distribution Corp. v. City of Great Falls, 169 Mont. 298, 546 P.2d 522 (1962), for example, this Court held that the requirements of Rule 38 were satisfied where the purpose of the rule was met. The purpose is to give the Attorney General's office sufficient time to intervene. U.S. Manufacturing, 546 P.2d at 524.

As the Clerk of the Supreme Court's docket sheet discloses, attached as Exhibit C, the transcript on appeal in U.S. Manufacturing was filed October 10 and the appellant's Rule 38 notice was filed

November 19th along with appellant's initial brief. The delay between the transcript being filed and the Rule 38 notice being filed was 40 days. If the time is computed from when the District Court's file was received by the Clerk on October 30, then the delay was 20 days.

In U.S. Manufacturing, this Court held that the Rule 38 notice was timely despite the delay:

> Appellant's argument concerning compliance with Rule 38, M.R.App.Civ.P., is of little merit. In Grant v. Grant, Mont., 531 P.2d 1007, 32 St.Rep. 191, 193; Clontz v. Clontz, Mont., 531 P.2d 1003, 32 St.Rep. 169, 172; and Gilbert v. Gilbert, Mont., 533 P.2d 1079, 32 St.Rep. 163, 165; this Court declined to rule on constitutional issues raised on appeal because certification to this Court and notification to the Attorney General had not been given pursuant to Rule 38. Requiring such notice to the state's chief legal officer is to enable him to appear in defense of the challenged legislative acts. In this matter certification to this Court and notice to the Attorney General were accomplished on November 19, 1975. Such notice provided ample opportunity for the

> Attorney General to prepare for the hearing held February 4, 1976. The spirit of the rule appears satisfied when such opportunity to prepare for the constitutional challenge is given. Accordingly, we reject the emphasis which appellant seeks to place on the immediacy of the notice required by Rule 38.

U.S. Manufacturing, 564 P.2d at 524-25 (emphasis supplied).

Of particular note is the fact that, in U.S. Manufacturing, 77 days elapsed between the Rule 38 notice, November 19, and the date the case was deemed submitted on February 4. Here, 128 days elapsed between the Rule 38 notice, June 13, and the submission date, October 19. Thus, the Attorney General had even more time to prepare in this case than the Attorney General did in U.S. Manufacturing.

The Court's decision in this case squarely conflicts with U.S. Manufacturing. Here, the delay in filing the Rule 38 notice is the same or less than in U.S. Manufacturing; the notice

here was filed before any briefs were filed, whereas the notice was filed along with the appellant's brief in U.S. Manufacturing; and here the Attorney General's office had even more time to prepare than in U.S. Manufacturing. Because the spirit of Rule 38 has been satisfied in this case, this Court should review the constitutional issues.

State ex rel. Morales v. City Commission, 174 Mont. 237, 570 P.2d 887 (1977), also supports this conclusion. In State ex rel. Morales, this Court considered a constitutional issue even though there was not strict compliance with Rule 38. This Court stated:

> Respondent, in its oral argument before this Court, alleged that appellant had failed to comply with Rule 38, M.R.App.Civ.P., and therefore the constitutional issue was not properly before the Court. In substance, Rule 38 provides that the Attorney General of the State of Montana must be notified of any proceeding in the Supreme Court which challenges the constitutionality of any act of the Montana Legislature. The record reflects

> that such a "notice of existence of constitutional question" was filed with this Court on January 11, 1977, as a portion of appellant's application for a writ of supervisory control. Apparently such notice was not refiled prior to this appeal.
>
> While Rule 38 was not strictly complied with in the instant case, we feel the spirit and intent of the rule was met. We therefore hold that the constitutional issue was properly before us.

State ex rel. Morales, 570 P.2d at 890.

Appellant's counsel is aware of no case decided by this Court where the Court refused to review constitutional issues which were properly raised in the district court and a Rule 38 notice was filed, as in this case, before any appellate briefs were filed. For example, in Eschenburg v. Eschenburg, 171 Mont. 247, 557 P.2d 1014 (1976), this Court declined to review the constitutional issues because the appellant did not file a Rule 38 notice until 7 months after the district court record was filed on appeal. In Eschenburg, the appellant filed the Rule 38 notice with

the reply brief.

In stark contrast to Eschenburg, the notice in this case was mailed 13 days after appellant's counsel received notice of the filing of the record and before any briefs were filed. As in U. S. Manufacturing and Morales, supra, the purpose of Rule 38 has been satisfied in the instant case. The Attorney General's office had sufficient time to intervene, but elected not to participate. For these reasons, this Court can review the constitutional issues raised by Mr. Hoffman. A rehearing on these issues should be granted.

III. The Constitutional Issues at Stake in the Instant Case Warrant Review Even if the Requirements of Rule 38 Were Not Met by Hoffman.

The severing of parental rights is perhaps one of the most severe sanctions that government can impose upon a person. For this reason parental rights constitute a "fundamental liberty interest." Santosky v. Kramer, 455 U.S. 745, 753

(1982); Franz v. United States, 707 F.2d 582, 595 (D.C.Cir. 1983); Matter of R.B., 217 Mont. 99, 103-104, 703 P.2d 846, 848 (1985) ("We emphasize that the termination in Montana of a natural parent's right to care and custody of a child is a fundamental liberty interest, which must be protected by fundamentally fair procedures.").

Where a constitutional issue is particularly significant, as in the instant case, this Court has addressed the constitutional issue even though it was raised for the first time on appeal. In Eastman v. Atlantic Richfield Co., 237 Mont. 332, 777 P.2d 862 (1989), this Court considered a constitutional challenge to the Occupational Disease Act. This Court stated:

> The employer argues that this Court should not address the claimant's constitutional arguments because he failed to present them before the lower court. It is a general rule that new issues may not be raised for the first time on

> appeal. . . . However, this Court "reserves to itself the power to examine constitutional issues that involve broad public concerns," and even if raised for the first time on appeal, this Court can hear the issue if the alleged error affects the substantial right of a litigant. Cottrill v. Cottrill Sodding Service (Mont. 1987), 744 P.2d 895, 896, 44 St.Rep. 1762, 1763.

Severance of Mr. Hoffman's parental rights certainly constitutes a "substantial right," and the constitutionality of a statute authorizing the severance of parental rights surely involves a "broad public concern." Furthermore, the constitutional issues were raised and fully briefed by Mr. Hoffman in the district court proceedings. For these reasons, even if this Court finds that Hoffman did not satisfy the requirements of Rule 38, this Court can and should review the constitutionality of M.C.A. §40-8-111(1)(a)(v).

IV. Refusal on Appeal to Review the Constitutional Issues Raised by Hoffman Constitutes a Violation of Due Process.

Under the circumstances in this case,

refusal on appeal to review the constitutionality of M.C.A. §40-8-111(1)(a)(v), would constitute a denial of due process to Hoffman under the federal and Montana Constitutions. U. S. Const. 14th Amend.; Montana Const. Art. II, Sect. 17.

In Montana, a litigant has a statutory and constitutional right of appeal to this Court. Rule 1, Mont.R.App.P.; Montana Power Co. v. Department of Public Service Regulation, 218 Mont. 471, 478, 709 P.2d 995, 999 (1985). "Although there is no [federal] due process right to an appeal, when a state does provide for an appeal, that appeal must accord with due process. . . ." Simmons v. Reynolds, 898 F.2d 865, 868 (2nd Cir. 1990); Mitchell v. Zimmerman, 582 F.Supp. 186, 187 (D.Penn. 1984). Due process on appeal requires a "meaningful review" of the issues raised. Bundy v. Wilson, 815 F.2d 125, 134 (1st Cir. 1987).

Hoffman does not contend that the

State does not have a legitimate interest in promoting judicial economy and orderliness through the adoption of reasonable procedural rules. Nevertheless, the constitutional right to due process limits the extent to which procedural rules can be invoked to preclude meaningful review of asserted federal rights. The United States Supreme Court has held on numerous occasions that "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Staub v. City of Baxley, 355 U.S. 313, 319 (1958), quoting, Davis v. Wechsler, 263 U.S. 22, 24 (1923). "[O]nce avenues of appellate review are established, they must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Miracle v. Estelle, 592 F.2d 1269, 1272, n. 6 (5th Cir. 1979).

In Williams v. State of Georgia, 349 U.S. 375, 382-83 (1955), the United States

Supreme Court stated:

> A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. The principle is clear enough. But the unique aspects of the never-ending new cases that arise require its individual application to particular circumstances. Thus, we would have a different question from that before us if the trial court had no power to consider Williams' constitutional objection at the belated time he raised it. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded [sic] from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.

(Emphasis added).

This Court, as discussed above, has on other occasions reviewed constitutional issues where the letter of Rule 38 Mont.R.App.P. has not been followed. See,

U. S. Manufacturing and Morales, supra. Similarly, this Court has decided a constitutional issue when it was not even raised in the district court. See, Eastman, supra. This Court has therefore exercised its discretion to decide constitutional issues raised on appeal. There is no reasonable basis for distinguishing the instant case from these other cases. In the instant case, the constitutional issues were properly raised in the district court and the purpose of Rule 38 has been satisfied; the Attorney General had ample opportunity to intervene and decided not to do so. Under these circumstances, due process requires this Court to provide a meaningful review of these asserted constitutional rights. For this reason, this Court should grant Hoffman a rehearing of the constitutional issues he has raised.

V. This Court's December 13 Decision Conflicts With Precedent Requiring Clear and Convincing Evidence of An Inability to Pay Support For An Entire Year.

In its December 13 decision, this

Court also overlooked controlling precedent on two other issues. First, in Matter of Adoption of Challeen, 172 Mont. 366, 563 P.2d 1120 (1977), this Court held that, under M.C.A. § 40-8-111(1)(a)(v), it must be established by clear and convincing evidence that there was an ability to pay child support throughout an entire year. See Appellant's initial brief at 19-23; Appellant's reply brief at 2-8. It is undisputed that Mr. Hoffman's entire income for January and February of 1988 was $495.00, and that between January and June 1988, Mr. Hoffman's income averaged $567.00 per month, while his basic living expenses were $718.00 per month. Appellant's reply brief at 3-5.

As Mr. Hoffman was able to obtain more work in the last part of 1988, his income increased. While an argument can be made that Mr. Hoffman could have provided some support from September though December of 1988, that still does not

alter his inability to pay during the first six months of 1988.

To overlook Matter of Adoption of Challeen is to terminate Mr. Hoffman's parental rights upon, at best, some evidence that he could have made nominal support payments for four or five months during the year. In Challeen, this Court demanded clear and convincing evidence of an inability to pay for an entire year and refused to allow an adoption even though the father admitted he could have paid for part of a year. This Court's decision in this case squarely conflicts with its decision in Challeen.

VI. The Court's December 13 Decision Conflicts With Prior Precedent Mandating That a District Court Make Specific Findings on Ability to Pay Support.

Second, this Court overlooked Matter of Adoption of K.L.J.K., 224 Mont. 418, 730 P.2d 1135 (1986) and its requirement that a specific finding be made on Mr. Hoffman's ability to pay. Appellant's initial brief at 14-16. The District

Court premised its decision on Mr. Hoffman's failure to pay child support, without any finding concerning his ability to pay. This Court affirmed the District Court, holding "that the District Court acted within its discretion. . ." December 13, 1990 decision at 6.

Though a District Court may exercise its discretion regarding findings of fact and its application of the law to those facts, a District Court has no discretion to change the law or to apply the wrong legal standard. Mr. Hoffman's first specification of error, that the District Court failed to apply the correct legal standard, has been overlooked by this Court. Appellant's initial brief at 10-16; Appellant's reply brief at 1, 2. Mr. Hoffman is entitled to a rehearing on this issue.

CONCLUSION

Mr. Hoffman is not an irresponsible parent. The record discloses that from

their births until the adoption hearing, Mr. Hoffman supported his three children for over 90 percent of their lives. He had a clear record of paying child until he ran out of work.

The record further discloses that Mr. Hoffman once had an excellent relationship with his children and that they loved him. That is, until his ex-wife alienated the children by refusing visitation, by making them ashamed of his poverty, and by refusing Mr. Hoffman's child support payment in September 1988.

M.C.A. §40-8-111(1)(a)(v) has been used as a sword in this case, when its purpose is to shield. That the adoption petition was filed at the earliest possible date with no knowledge of Mr. Hoffman's ability to pay reveals the invidious intent behind the petition. Mr. Hoffman's mistake was to become angry and walk away when his child support was rejected in September 1988, instead of seek-

ing legal counsel as did his ex-wife. Mr. Hoffman's naivety prevented him from seeing the trap and he did just what his ex-wife hoped for--the shame and frustration became too much and he gave up.

Mr. Hoffman was a good, loving father for many years. Please grant him a rehearing so that all issues can be carefully considered.

Respectfully submitted this 22nd day of December, 1990.

CROWLEY, HAUGHEY,
HANSON, TOOLE &
DIETRICH

By s/ Donald L. Harris
Donald L. Harris
P. O. Box 2529
Billings, Montana 59103
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 1990, I mailed a copy of the foregoing to the following counsel of record:

Marvin Ventrell
720 North 30th Street
Billings, Montana 59101

s/ Donald L. Harris

cc: Mark Racicot, Attorney General

IN THE SUPREME COURT

OF THE STATE OF MONTANA

Case No. 90-267

IN THE MATTER OF THE ADOPTION)
OF C.J.H., W.L.H., T.A.H., Minors.)

AFFIDAVIT OF
DONALD L. HARRIS

STATE OF MONTANA)
: ss.
County of Yellowstone)

DONALD L. HARRIS, being first duly sworn, deposes and says:

1. I am an attorney licensed to practice law in Montana and represent appellant Warren Hoffman in this case.

2. I have represented Mr. Hoffman on a pro bono basis throughout this case because he is indigent. I did not know Mr. Hoffman before I began representing him in this case. I have devoted nearly 200 hours to Mr. Hoffman's case, including trial and appeal.

3. In reviewing my time records,

calendar, and file for this case, I note that the Notice of Receipt of Record was mailed to our office on May 25, the Friday before the Memorial Day weekend. I was in Butte that day making a presentation to the Silver Bow County Bar Association on pro bono work. Justice Sheehy also made a presentation.

4. Our office did not receive the Notice of Record until Tuesday, May 29. I reviewed the notice, saw that our appearance fee was due, and directed that it be paid immediately. Because I was preparing for another hearing, a settlement conference, and was out of town for three of the next eight work days, I was not able to turn my attention to this case again until Sunday, June 10. It was then that I reviewed Rule 38 and discovered that I had not filed the required notice of constitutional challenge immediately upon receiving notice that the record had been filed.

5. I prepared the Notice of

Constitutional Challenge on Monday, June 11, and that same day our office mailed that notice to opposing counsel, to the Attorney General's office, and the Clerk of the Supreme Court. We thereafter also served the Attorney General's office with a copy of our briefs when they were filed with the Clerk.

6. For some reason, I was under the mistaken belief that the Rule 38 notice was to be filed upon service of our initial brief. I was very aware from my research during the trial court proceedings of the importance of filing the Rule 38 notice. I simply have no explanation for why I thought the Rule 38 notice was due with the initial brief. Rule 38 is clear, and as soon as I read Rule 38 on June 10, I knew that my previous understanding was mistaken.

7. In my appeal briefs, I did not address my late notice under Rule 38 because the Attorney General gave no indi-

cation that it intended to participate in this case. Although my Rule 38 notice was served 13 days after receiving notice of the record, I did not believe this delay had caused any prejudice, or would prevent this Court from considering the constitutional issues. Respondent's counsel did not argue in his brief that my late Rule 38 notice precluded review of the constitutional issues. In fact, respondent's counsel fully briefed the constitutional issues.

8. I can assure this Court that my mistake in not immediately filing the Rule 38 notice was totally inadvertent. I deeply apologize. The importance of this case has been foremost in my mind since I agreed to represent Mr. Hoffman. I have handled this case as diligently and as professionally as I know how. That Mr. Hoffman's constitutional rights might be nullified because I did not give the Attorney General immediate notice of my

constitutional challenge is a harsh penalty to impose--especially given that the Attorney General's office elected not to participate. I ask this Court not to penalize Mr. Hoffman for my mistake. He genuinely loves his children, and his case deserves the closest scrutiny of all issues appealed.

Respectfully submitted this 22nd day of December, 1990.

s/ Donald L. Harris

Subscribed and sworn to before me this 22nd day of December, 1990.

s/Marguerite A. Beringer
Notary Public for the
State of Montana
Residing at Billings,
Montana
My Commission expires
8-1-92

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 1990, I mailed a copy of the foregoing to the following counsel of record:

Marvin Ventrell
720 North 30th Street
Billings, Montana 59101

s/Donald L. Harris

cc: Marc Racicot, Attorney General

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 90-267

IN THE MATTER OF THE ADOPTION OF C.J.H., W.L.H., T.A.H., Minors

AFFIDAVIT OF PATRICIA J. SCHAEFFER JORDAN

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

COMES NOW Patricia Schaeffer Jordan, being first duly sworn on her oath, and deposes and states:

1. That affiant is and has been an Assistant Attorney General for the State of Montana since April 23, 1983.

2. That Affiant in consultation with the Attorney General has responsibility for reviewing and screening constitutional challenges made in cases in which the State of Montana is not a party to determine whether intervention by the State is warranted.

3. That affiant received directly from appellant on June 13, 1990, Appellant's Notice of Constitutional

Challenge in the above-captioned appeal.

4. That in cases where a constitutional challenge has been made affiant customarily waits until she at least has received the appellant's brief to evaluate whether it is appropriate for the Attorney General's office to intervene.

5. That affiant received, in connection with the above-referenced case, directly from the parties appellant's brief, respondent's brief, and appellant's reply brief.

6. That after review of the appellant's brief and respondent's brief, affiant determined that intervention by the Attorney General's office was not warranted and therefore declined to intervene.

s/Patricia S. Jordan
PATRICIA SCHAEFFER JORDAN

SUBSCRIBED AND SWORN to before me this 18th day of December, 1990.

s/Donna Mike

Notary Public for the State of Montana; Residing at Helena, Montana; My commission expires: Jan. 8, 1992

REGISTER OF ACTIONS
No. 13188

TITLE OF CAUSE

U. S. Manufacturing &
Distributing Corp.,

Plaintiff and Appellant,

vs.

CITY OF GREAT FALLS,

Defendant and Respondent.

NATURE OF ACTION

Filed in the District Court of the 8th Judicial District on Appeal from Cascade County. District Judge Paul G. Hatfield, presided.

Nature of Action:

Declaratory Judgment action.

Attorneys:

E. F.Gianotti & Randono, 2301 Tenth Avenue South, Great Falls, 59401.

Larsen & Gliko, 1711 Tenth Avenue South, Great Falls, 59401

Date	Memorandum of Proceedings	
1975		$20.00
10-10	Transcript of proceedings	
10-30	District Court File No. 79779-B	
11-10	Order granting appellant 30 days to file brief	
11-18	Appellants brief	

11-19	Notice of constitutional question of S 94-8-110 and S 94-8-110.1, R.C.M. 1947
12-17	Respondents Brief; no fee.
1976	
1-8	Appellants Reply Brief
1-13	Ordered set for hearing and oral argument 2-4-76 at 11:30 A.M.
2-4	Argued and submitted, oral argument presented by Ralph Rondono and E. J. Gianotti - appellants; David Gilko - respondent.
2-25	Opinion Justice Wesley Castles, judgment of the District Court is reversed unanimous
3-9	Remittitur and copy of opinion sent to Clerk of District Court, Great Falls, and ordered District Court file be returned to Clerk of District Court, Great Falls, Cert. #75843.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 90-267

IN THE MATTER OF THE ADOPTION OF)
)
C.J.H., W.L.H., T.A.H., Minors)

ORDER

The appellant in the above matter has filed a Petition for Rehearing and the respondent has filed Objections to Appellant's Petition for Rehearing. The Court having considered the Petition and the Objections

IT IS HEREBY ORDERED that the Petition for Rehearing is denied.

DATED this 28th day of January, 1991.

s/J. A. Turnage
Chief Justice

s/ Diane G. Barz

s/John Conway Harrison

s/John C. Sheehy

s/Fred J. Weber

Justices

Justices Wm.E. Hunt, Sr., and R. C. McDonough would grant the petition.

REGISTER OF ACTION
IN THE SUPREME COURT OF THE STATE OF MONTANA

Case Number: 90-267*CLOSED*012891
Records checked out to:

Fee: $75.00 Paid: XX Due:
Date: 05/30/90 By Whom: Crowley Law Firm #108113

Title of Case:

IN THE MATTER OF THE ADOPTION OF C.J.H., W.L.H., T.A.H., Minors

Type of Appeal: Civil-ADOPTION

Appellants Attorneys:

Donald L. Harris
Crowley, Haughey, Hanson, Toole & Dietrich
P. O. Box 2529
Billings, MT 19103
Information: 252-3441
(W.J.H.-Respondent)

Respondents Attorneys:

Marvin R. Ventrell
Gannett & Ventrell
P. O. Box 1375
Billings, MT 59103-1375
Information: 245-6338
(R.W.K.-Petitioner)

Amicus Attorneys:

(On Constitutional Challenge)

Hon. Marc Racicot
Attorney General
Justice Building
Helena, MT 59620
Information: 444-2026

Date Appeal Notice Filed: 05/08/90

Date of Judgment Order: 05/03/90

District Court Case Number: DA-89-001

Judicial District: Thirteenth
County: Yellowstone
Judge: William J. Speare

Date	Register of Action
05/25/90	Transcript filed. District Court Record Filed. (1 folder, 1 env. exhibits; 1 trans. w/copies) (ID: jh)
06/13/90	Appellant's Notice of Constitutional Challenge. Copy to AG (ID: jh)
06/25/90	Order granting appellant to June 29, 1990, to file brief. (ID: jh)
07/02/90	Appellant's brief filed. (ID: jh)
07/30/90	Order granting respondent to Aug. 22, 1990, to file brief on appeal. (ID: jh)
08/21/90	Respondent's brief filed. (ID: pb)
08/31/90	Order; granting appellant to Sept. 19, 1990, to file reply brief. (ID: jh)
09/18/90	Order; appellant granted an extension of time to 9/26/90 to file reply brief. (ID: pb)
09/27/90	Reply brief filed; SENT TO COURT. (ID: RMY)

10/19/90	Order classifying case for submission on briefs to the Court en banc. (ID: RMY)
12/13/90	Opinion; Weber; affirmed; Turnage; Sheehy; Barz and Harrison concur. Justices McDonough and Hunt dissent.
12/20/90	Affidavit of Patricia J. Schaeffer Jordan. (ID: jh)
12/24/90	Petition for Rehearing filed. (ID: jh)
12/31/90	Respondent's Objections to Appellant's Petition for Rehearing. (ID: jh)
01/28/91	Petition for Rehearing DENIED. (ID: rr)
01/28/91	Remittitur issued. District Court Record returned. (ID: rr)

Closed